

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

EARL LYNN BAGLEY, ) Case No. C05-1161-JCC-JPD  
Petitioner, )  
v. ) REPORT AND RECOMMENDATION  
UNITED STATES OF AMERICA, )  
Respondent. )

## INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Earl Lynn Bagley is a federal prisoner serving a fifty-one-month sentence for possession of child pornography. He has filed a habeas corpus petition under 28 U.S.C. § 2255 seeking to vacate, set aside, or correct his 2004 federal court sentence. Respondent has filed a response opposing the motion. Following a careful review of the parties' pleadings, supporting documents, and the record, the Court recommends that petitioner's motion be denied.

## FACTS

On December 18, 2003, petitioner was stopped by Bureau of Immigration and Customs Enforcement agents as he and a Canadian citizen attempted to enter the United States by car at Blaine, Washington. Case No. CR04-18, Dkt. No. 1. The two men were referred to a secondary vehicle inspection to determine the immigration status of the Canadian. *Id.* During the secondary inspection, a customs agent searched petitioner's car and found a laptop

01 computer. *Id.* After a brief search in the “My Pictures” directory, the agent found at least six  
 02 images of child pornography.<sup>1</sup> *Id.*

03 On April 20, 2004, petitioner entered into a plea agreement in which he pleaded guilty  
 04 to one count of possessing images of a minor engaged in sexually explicit conduct. Case No.  
 05 CR04-18, Dkt. No. 23. The plea agreement stipulated to a sentence of fifty-one months and  
 06 explicitly included a waiver of petitioner’s right to a “speedy and public trial.” *Id.* It also  
 07 provided that petitioner agreed to forfeit the laptop computer and all images of child  
 08 pornography. *Id.* At sentencing, the Court found that petitioner was fully competent and  
 09 accepted the guilty plea. Dkt. No. 24 at 13.

10 On January 3, 2005, petitioner appealed his conviction, with the assistance of court-  
 11 appointed counsel, to the Ninth Circuit. Case No. CR04-18, Dkt. No. 41. Petitioner  
 12 subsequently withdrew his appeal and on April 25, 2005, the Ninth Circuit issued its mandate.  
 13 Dkt. No. 51. On June 10, 2005, petitioner filed the present 28 U.S.C. § 2255 motion.<sup>2</sup> Case  
 14 No. C05-1161, Dkt. No. 4, Attach. 4.

15 CLAIMS FOR RELIEF

16 Petitioner raises four claims for relief.<sup>3</sup> First, he argues that his right to a speedy trial  
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18 <sup>1</sup>Petitioner claimed to have sole ownership and control of the computer. Case No.  
 19 CR04-18, Dkt. No. 1. He claimed, however, that the pornographic images had “popped up”  
 20 on his computer screen while he was surfing the internet, that he had logged the web sites he  
 21 had visited, and that he had attempted to inform the Federal Bureau of Investigation about the  
 22 images. *Id.* Petitioner denied knowing that possessing and/or importing images of child  
 23 pornography was against the law. *Id.* Forensic analysis later found approximately 100 images  
 24 of child pornography on the computer. Dkt. No. 23.

25 <sup>2</sup>Petitioner originally filed his motion in the Central District of California, but the  
 26 petition was transferred to this Court because he was sentenced here. Dkt. No. 4. The motion  
 was docketed in this Court on June 24, 2005.

25 <sup>3</sup>Petitioner’s reply also appears to argue that the Supreme Court has held that the  
 26 United States Sentencing Guidelines are unconstitutional, presumably under *United States v. Booker*. 125 S. Ct. 738 (2005). This claim, however, should be deemed waived, because it  
 was not properly raised in petitioner’s opening brief. *Koerner v. Grigas*, 328 F.3d 1039, 1048-

01 was violated when counsel “induced” him to sign a plea agreement and waive his right to a  
 02 preliminary hearing. Case No. C05-1161, Dkt. No. 4, Attach 4. He also suggests defense  
 03 counsel agreed to continue his trial date beyond the time period required by the Speedy Trial  
 04 Act without obtaining his signature. *Id.* Second, petitioner claims that the search and seizure  
 05 of his computer was unconstitutional. *Id.* Third, petitioner claims that the government failed  
 06 to produce evidence favorable to him. *Id.* He argues that the government possessed only his  
 07 hard drive (and not his computer), and that had he known this at the time, he would have  
 08 demanded that the government produce the laptop and filed a motion to dismiss. *Id.* Finally,  
 09 petitioner claims that his detention in a non-medical facility violates the October 29, 2004,  
 10 order of the sentencing judge that he be held in a medical facility. *Id.*

11 DISCUSSION

12 A. Petitioner Waived His Right to Assert a Violation of the Speedy Trial Act By  
 13 Entering Into a Valid Plea Agreement.

14 Petitioner argues that his right to a speedy trial was violated when counsel “refused” a  
 15 preliminary hearing before a United States Magistrate Judge on December 31, 2003, and had  
 16 him sign a waiver of that hearing. Case No. C05-1161, Dkt. No. 4, Attach. 4. He also claims  
 17 that his lawyer agreed to continue his trial beyond the deadline required by the Speedy Trial  
 18 Act without his signature. *Id.*

19 The record indicates that petitioner waived his right to a preliminary hearing after a  
 20 lengthy colloquy before a United States Magistrate Judge. Case No. C05-1161, Dkt. No. 23,  
 21 Attach. 5. He also filed a written waiver of his right to such a hearing. CR04-18, Dkt. No. 9.  
 22 Although the record shows that the trial date was continued upon an agreed motion by the  
 23 parties, the record contains no signed waiver or extension of petitioner’s right to a speedy trial.

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 26 49 (9th Cir. 2003). Even if this claim were properly raised, it would fail on the merits because  
 petitioner admitted the facts necessary to convict and sentence him. Moreover, he agreed to  
 the length of the sentence imposed. Case No. CR04-18, Dkt. No. 23.

01 Dkt. Nos. 15-18.

02 Petitioner, however, may not assert a violation of the Speedy Trial Act. By entering  
 03 into a valid plea agreement a defendant “waives all nonjurisdictional defect claims. The right  
 04 to a speedy trial under the Speedy Trial Act is nonjurisdictional.” *United States v. Bohn*, 956  
 05 F.2d 208, 209 (9th Cir. 1992) (per curiam) (internal citations omitted). In this case, the  
 06 sentencing judge found that petitioner was “fully competent” to enter his guilty plea after a  
 07 colloquy in open court. Case No. CR04-18, Dkt. No. 24 at 13. The Court found that the plea  
 08 agreement was “made voluntarily and freely with the full understanding of the charges and  
 09 consequences of the plea, and that the [petitioner] committed the crime charged.” *Id.* Indeed,  
 10 petitioner does not argue that the plea was not knowing and voluntary, nor that he was  
 11 incompetent. Therefore, because petitioner entered into a valid plea agreement, his argument  
 12 that his right to a speedy trial was violated must fail.

13 B. Because Petitioner Had An Opportunity To Raise His Unconstitutional Search  
 14 Claim On Direct Appeal, He May Not Raise it in a § 2255 Petition.

15 Petitioner argues that the search of his car and computer by customs officials at the  
 16 border was unconstitutional. Case No. C05-1161, Dkt. No. 4, Attach. 4. Petitioner, however,  
 17 may not assert this claim in a § 2255 motion. When § 2255 petitioners have had a “full and fair  
 18 opportunity” to raise an illegal search-and-seizure claim on direct appeal, subsequently they  
 19 may not raise such claims in a § 2255 motion. *United States v. Hearst*, 638 F.2d 1190, 1196  
 20 (9th Cir. 1980) (internal citations omitted). In this case, after he pleaded guilty, petitioner filed  
 21 a notice of appeal with the assistance of appellate counsel, but later withdrew the appeal. Case  
 22 No. CR04-18, Dkt. Nos. 41-45, 51, 53. Because petitioner had an opportunity to raise his  
 23 unconstitutional search claim on direct appeal, but declined to do so, he is barred from raising  
 24 it in the present § 2255 motion.

25 Even if petitioner was not barred from raising this claim for the first time on collateral  
 26 review, it would fail on the merits. It is “well established” that customs officials may conduct

01 warrantless border searches without “any level of articulable suspicion, so long as the search is  
 02 routine” *United States v. Okafor*, 285 F.3d 842, 845 (9th Cir. 2002) (emphasis added) (citing  
 03 *United States v. Montoya de Hernandez*, 473 U.S. 531, 537-38 (1985). A border search  
 04 becomes non-routine “only when it reaches the degree of intrusiveness present in a strip search  
 05 or body cavity search.” *Id.* (citing *United States v. Ramos-Saenz*, 36 F.3d 59, 61 (9th  
 06 Cir.1994). In contrast, the Ninth Circuit has held “that searches of handbags, luggage, shoes,  
 07 pockets and the passenger compartments of cars are clearly routine.” *United States v. Molina-  
 08 Tarazon*, 279 F.3d 709, 713 (9th Cir. 2002).<sup>4</sup>

09       In this case, the search of petitioner’s vehicle and computer occurred in the context of a  
 10 routine border search. After petitioner and his Canadian passenger arrived at the border,  
 11 agents conducted a secondary vehicle search to ascertain the immigration status of the  
 12 passenger. Case No. CR04-18, Dkt. No. 1. “Pursuant to border search practices,” the agents  
 13 found petitioner’s laptop, turned it on, and found at least six thumbnail images in the “My  
 14 Pictures” directory that appeared to be child pornography. *Id.* There is nothing to suggest  
 15 that this search approximated the intrusiveness of a strip search or body cavity search. Indeed,  
 16 no passwords, special forensics tools, or other arguably intrusive techniques were used to find  
 17 and search the computer. To the contrary, this is the type of straightforward and routine  
 18 search that is permitted at our nation’s borders. Thus, even if petitioner could raise this claim  
 19 here, it would fail on the merits.

20       C.     The Prosecution Did Not Fail to Produce Evidence Favorable to Petitioner.

21       Petitioner argues that the prosecution failed to produce evidence that would have been  
 22 favorable to his defense. Case No. C05-1161. Dkt. No. 23. He contends that the government

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 24       <sup>4</sup>Although *Molina-Tarazon* was abrogated by the Supreme Court in *U.S. v. Flores-  
 25 Montano*, 541 U.S. 149 (2004), the decision did not abrogate this proposition. In fact, *Flores-  
 26 Montano* authorized broader search authority at the border, because it dispensed with any  
 requirement that border officials have a “reasonable suspicion” to disassemble a vehicle fuel  
 tank.

01 possessed only the hard drive to his laptop and not the computer itself, and that the  
02 government should have disclosed this information. *Id.* Petitioner argues that had he known  
03 this before he entered his guilty plea, he would have demanded that the prosecution produce  
04 the entire laptop or would have filed a motion to dismiss. *Id.* This argument, however, is  
05 premised on a mistake of fact. Petitioner forfeited the entire laptop computer and it has  
06 remained in the possession of the government. Case No. CR04-18, Dkt. Nos. 36, 49, 50. This  
07 claim therefore lacks merit.

08 D. Petitioner's Detention in a Non-Medical Facility Does Not Violate the  
09 Sentencing Judge's Sentencing Order.

10 Petitioner argues that the sentencing judge ordered that he be detained in a medical  
11 facility and that because he has been incarcerated at the federal penitentiary in Lompoc,  
12 California, (a non-medical facility), the Court's order is being violated. Case No. C05-1161,  
13 Dkt. No. 23. He also argues that the federal penitentiary in Lompoc is unable to properly treat  
14 him and that he is likely to die in prison if he is not transferred to a medical facility. *Id.*

15 At petitioner's October 29, 2004, sentencing, the Court did not order that he be  
16 incarcerated in a medical facility. In fact, the Court rescinded an August 30, 2004, order  
17 executed by a United States Magistrate Judge directing petitioner to be transferred to the  
18 federal medical center. Case No. CR04-18, Dkt. No. 46 at 9-10. No other standing order in  
19 the record suggests petitioner should now be held in a medical facility. Thus, petitioner's claim  
20 that the Court's order is being violated is without merit.

21 Nevertheless, petitioner's medical condition has been an ongoing concern for the  
22 parties in this proceeding, as well as in the underlying criminal proceeding. Among other  
23 things, petitioner suffers from a chronic ulcer on his leg that has threatened his life at least  
24 once. Case No. C05-1161, Dkt. No. 13, Attach. 17 at 3. The Court has determined  
25 previously that the Federal Penitentiary in Lompoc was providing petitioner adequate care  
26 pending the outcome of this motion. *Id.* at Dkt. No. 21.

01 It now appears, however, that petitioner has been transferred from the Lompoc  
02 Penitentiary to the Federal Corrections Institution in Glenville, West Virginia. Dkt. No. 29. It  
03 appears that petitioner's medical claim is moot in light of his transfer. Additionally, such a  
04 claim would not properly be brought under 28 U.S.C. § 2255. *See Brown v. United States*,  
05 610 F.2d 672, 677 (9th Cir. 1980) (noting that § 2255 petitions can test only the sentence  
06 imposed and not the execution of the sentence); *see also United States v. Thiele*, 314 F.3d  
07 399, 401 (9th Cir. 2002) (explaining that § 2255 is available only to defendants who are in  
08 custody and claiming the right to be released). If petitioner believes that he is not receiving  
09 adequate medical care at his new facility in West Virginia, he may bring a separate 42 U.S.C. §  
10 1983 civil action in the District of West Virginia.

11 CONCLUSION

12 For the reasons set forth above, petitioner's § 2255 motion should be denied. A  
13 proposed order accompanies this Report and Recommendation.

14 DATED this 6th day of December, 2005.

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17 JAMES P. DONOHUE  
18 United States Magistrate Judge  
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